United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING EN BANC

74-1027

In the
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 984, Sept. Term 1973

Docket No. 74-1027

UNITED STATES OF AMERICA,
Appellee,

vs.

MILTON PARNESS AND BARBARA PARNESS,
Appellants.

On Appeals from Judgments of the United States District Court for the Southern District of New York.

PETITION FOR REHEARING

and

SUGGESTION FOR REHEARING IN BANC

Respectfully submitted,

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The appellants herein, pursuant to Rule 40(a) of the Federal Rules of Appellate Procedure, respectfully request a rehearing of the judgment and opinion entered by this Court (Friendly and Timbers, Circuit Judges*), on June 27, 1974. Further, pursuant to Rule 35(b) of the

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* As the panel noted, the parties agreed in open court that these appeals would be heard and decided by a panel of two judges.

Federal Rules of Appellate Procedure, the appellants hereby suggest the appropriateness of a rehearing in banc, on the ground specified in Rule 35(a), that "the proceeding involves a question of exceptional importance." In support of these requests, the appellants state the following:

I.

The panel decision has erroneously resolved novel and important constitutional and statutory problems arising under the Organized Crime Control Act of 1970.

As the panel opinion noted (p. 4429), these appeals involve two questions that "appear to be ones of first impression." Their uniqueness is exceeded only by their importance, making it doubly appropriate that they be considered and resolved by this Court sitting in banc.

A. Does §1962(b) apply to the acquisition of a foreign enterprise?

In holding that §1962(b) outlaws the acquisition of an interest in a foreign Antillean corporation engaged in commerce with the United States, the panel opinion has misread the intent of Congress and has misapplied the relevant rule of statutory construction as articulated by the Supreme Court.

Section 1962(b), very broadly and without seeming exception, proscribes the acquisition, by use of the proceeds of racketeering activities, of any interest in "any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." But while Congress intended this provision to be broadly construed, as the panel opinion correctly notes (p. 13), such a broad provision -- like the equally broad "commerce" provisions of the Labor Management Relations

Act[1] -- must be read in the context of a statute that prima facie is territorially limited to enterprises within the United States that are engaged in interstate or foreign commerce.

As the Supreme Court has noted, American Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909), "All legislation is prima facie territorial." To overcome that prima facie premise, as the decisions respecting the territorial scope of the Labor Management Relations Act show,[2] the intention to extend a statute extraterritorially must be clearly and affirmatively expressed, either in the statutory language or in the legislative history. Benz v. Compania Naviera Hidalgo, 353 U.S. 138, 147 (1957). Without such a clear and affirmative declaration from Congress, courts cannot apply a statute "willy-nilly into the complex of considerations affecting foreign trade." Windward Shipping, Ltd. v. American Radio Assn., U.S. Supreme Court No. 72-1061, 42 Law Week 4234, 4236 (Feb. 19, 1974).

As is evident even from the panel opinion, there is not one word in Title IX of the Organized Crime Control Act, or in its legislative history, affirmatively indicating that Congress intended to include foreign enterprises or corporations within the protective umbrella of

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1. The panel opinion, in fn. 11, states that "We reject out of hand the claim that the activities of Hotel Corp. did not have the requisite effect on interstate or foreign commerce." But the appellants made no such claim. The panel apparently misunderstood appellants' argument, based on the Supreme Court's analysis of the Labor Management Relations Act, that a foreign enterprise engaged in foreign commerce with the United States is not necessarily within § 1962(b)'s reference to enterprises engaged in or affecting foreign commerce. That problem depends upon congressional intention, not on the factual "effect" on commerce. See Appellants' Brief, pp. 29-30.

2. See the Benz-McCulloch-Windward line of Supreme Court cases, discussed at pp. 4444-4445 of the panel opinion, and at pp. 28-33 of Appellants' Brief.

§ 1962(b).[3] That being so, the Benz-McCulloch-Windward rule of statutory construction mandates that § 1962(b) be interpreted so as to exclude investments in foreign enterprises, however much those enterprises may affect commerce with the United States. The efforts of the panel to avoid that rule of construction are not only unpersuasive but raise new and important problems concerning the applicability of that rule to statutes other than the Labor Management Relations Act. Such problems are of a stature meriting this Court's in banc reconsideration, and are ultimately worthy of Supreme Court review.

(a) The panel's statement (p. 4445) that the Benz-McCulloch-Windward proposition is "simply that a court should consider the legislative history of a statute to determine its applicability to a given factual situation" is deceptively inadequate. The whole thrust of the proposition is that a court should consider both the language and the history of a statute to determine if there "be present the affirmative intention of the Congress clearly expressed," Benz, 353 U.S. at 147, that it be applied in a foreign or extraterritorial manner.

(b) As the panel noted (p.4445), the Benz-McCulloch-Windward line of cases involved the exercise of American sovereignty in a maritime area in which international comity was traditional and in which the potential of international discord was great. But the rule of statutory construction epitomized by those cases has been applied in other non-maritime situations involving far less acute factors of international

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3. The panel opinion totally ignores the fact that Title IX of the Organized Crime Control Act, by its own title, is designed to protect and cleanse "Racketeer Influenced and Corrupt Organizations." Specifically, § 1962(b) is designed to protect domestic enterprises from specified types of "racketeer" investments.

comity and international discord. Indeed, this Court (per Friendly, C.J.) applied the very essence of this rule in holding that § 10(b) of the Securities Exchange Act was not intended to impose rules of conduct on transactions occurring outside the United States, where the American citizenship of the purchaser was the only connection with the United States. Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326, 1334 (2nd Cir. 1972) . Said the Court:

> " * * * If Congress had expressly prescribed a rule with respect to conduct outside the United States, even one going beyond the scope recognized by foreign relations law, a United States court would be bound to follow the Congressional direction unless this would violate the due process clause of the Fifth Amendment. However, the language of § 10(b) ... is much too inconclusive to lead us to believe that Congress meant to impose rules governing conduct throughout the world in every instance where an American company bought or sold a security." (Emphasis added)

And so, in this case, the rule becomes applicable to determine if Congress intended to protect foreign enterprises throughout the world from the ravages of American racketeering investments. Contrary to the panel's statement (p.4446), Title IX in general and § 1962(b) in particular would appear to involve a regulation of the internal affairs of, and investments in, the designated enterprises. And to the extent that those enterprises are subject to foreign regulatory laws, as is true in the instant case, these statutory provisions trench upon the sovereign power of foreign states, with the potential of international discord. See Appellants' Brief, p. 24; and see Govt. Exhs. 100 and 101, referring to the requirements of Netherlands Antilles

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4. See, e.g., Herbert Harvey, Inc. v. N.L.R.B., 424 F.2d 770,773 (C.A.D.C. 1969), applying the Benz-McCulloch-Windward rule in concluding that Congress had not clearly and affirmatively expressed an intent that the Labor Board exercise jurisdiction over the operations of the World Bank.

laws respecting the assignment and transfer of corporate shares.

(c) Contrary to the panel's statement (p.4446), the decision here does break new ground in applying Federal criminal sanctions in an effort to protect all enterprises in the world from the evils of American racketeering investments. Whatever may be the situation created by older decisions under the civil antitrust and securities laws, the Benz-McCulloch-Windward rule mandates that any such extension of Federal power be expressly and affirmatively indicated by Congress, particularly in the context of a harsh criminal statute.

(d) The panel's emphasis (pp.4443-4444) upon Congress' concern with the influences of organized crime on the American economy, plus the panel's reference (fn. 11) to the American-based involvement in this alleged crime, cannot do service as an indication of Congressional intent to extend § 1962(b) to investments in foreign enterprises. In one of the analogous Labor Act decisions, McCulloch v. Sociedad Nacional, 372 U.S. at 18-19, the Supreme Court rejected just such a "balancing of contacts" approach to the question whether the Act was designed to apply to a labor dispute aboard a foreign vessel, where the American contacts were substantial.

In sum, the complete absence of any affirmative Congressional intent to apply § 1962(b) to foreign enterprises combines with the repeated legislative statements that Title IX was designed to protect only American or "our" enterprises so as to bar the instant prosecution under Count One. See Appellants' Brief, pp. 24-26.

B. Is § 1962(b) unconstitutionally vague?

The second unique and important question, worthy of reconsideration in banc by this Court, concerns the validity of § 1962(b), on its

face and as applied, in terms of the vagueness doctrines of the Fifth Amendment. See Appellants' Brief, pp. 33-52.

The panel decision has compounded the confusion that permeates § 1962(b), particularly as it has been interpreted and applied in this case. Such confusion stems in large part from the panel's failure to recognize that appellants' claims as to vagueness rest primarily on the strange admixture, in Count One and in the charge to the jury, of the elements of § 1962(b) and § 2314.

However clear § 1962(b) and §2314 may appear on their face and in juxtaposition with each other, as applied in this case, those two statutes must be deemed unconstitutionally vague. In short, § 1962(b) was translated by the indictment and the jury charge into an allegation of having devised a scheme to defraud, pursuant to which the appellant Parness (a) engaged in a pattern of racketeering activity in violation of § 1962(b), and (b) caused three acts of interstate transportation in violation of § 2314. The scheme to defraud, which is not mentioned in § 1962(b), was thus made the fulcrum of that crime. And in § 2314 allegations, having been shoved together under Count One, lost all independent status as "predicate crimes."

Left unanswered by the panel's opinion are the two basic problems of vagueness, as § 1962(b) has here been applied:

(a) How can a defendant know, <u>at a point prior to making an investment outlawed by § 1962(b)</u>, that he dare not use the proceeds of two or more "indictable" racketeering actions, if the investment and the racketeering actions are all lumped together in one indictment as component parts of a scheme to defraud? Is not the defendant at that critical point entitled to notice as to what <u>past</u> acts are "indictable"?

(b) How can a defendant know if he has engaged in a "pattern of racketeering activity" by simply causing two or three interstate incidents in pursuit of a single scheme to defraud? It must be remembered that, while § 2314 on its face does not require that the two checks mentioned in Counts Four and Six by transported pursuant to a scheme to defraud (see panel opinion, p.4449), Count One of the indictment and the jury charge (618a) transformed those two check transportations into separate elements of an overall scheme to defraud. And so we return to the basic question as to whether § 1962(b), by its cross-reference to § 2314, refers to (1) at least two independent schemes to defraud forming a pattern of conduct, or (2) at least two elements of a single scheme to defraud forming more of a multi-faceted plan than a pattern of conduct.

The panel's opinion (p. 4448) provides no answer to those questions by its citation of decisions under the Travel Act and the Gun Control Act. Neither of those statutes involves a true "predicate crime" situation.[5] But here, if § 2314 is to retain its intended "predicate" status, both its "indictable" characterization and its role in the "pattern of racketeering activity" must be consummated prior to the making of an investment illegalized by § 1962(b). Otherwise,

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5. The Travel Act (18 U.S.C. § 1952) proscribes travel in commerce with intent to engage in other unlawful conduct; such unlawful conduct is merely indicative of intent and is not a predicate to a Travel Act offense. United States v. Rizzo, 418 F.2d 71,79. (7th Cir. 1969) The Gun Control Act (18 U.S.C. § 924(c) outlaws carrying a firearm "unlawfully" during the commission of any Federal felony; the carrying of the gun is considered a separate offense and is not a predicate to prosecution for the main felony. United States v. Rizzo, 418 F.2d 71,79 (7th Cir. 1969)

the defendant cannot be forewarned, and the prosecutor, judge and jury cannot be guided, as to what options were open after the commission of the "predicate" actions, so that the defendant "can intelligently choose, in advance, what course it is unlawful (in light of § 1962(b)) for him to pursue." Connelly v. General Construction Co., 269 U.S. 385, 393 (1926)[6].

Congress obviously intended that the "predicate" acts of racketeering, including offenses under § 2314, constitute "at least two independent offenses forming a pattern of conduct" (116 Cong. Rec. 35193) over a period no longer than ten years (1961(5)). Congress just as obviously did not intend that this "predicate" scheme be left vague or indefinite, particularly by intertwining the predicate crimes and the main crime together under the rubric of a single scheme to defraud. Thus, the failure of the panel to insist that some degree of definiteness and separateness be read into the "indictable" and the "pattern of racketeering activity" concepts, not only infringes on the appellants' Fifth Amendment due process rights, but ill serves the purpose and the intent of Congress.

Indeed, the panel's interpretation and application of § 1962(b) can well lead to an expanded use of the Organized Crime Control Act to ensnare others like the appellants, who have no connection with the "organized crime" elements, but who have participated in debatable loan or stock transactions. Like the Travel Act and the Hobbs Act, the

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6. It bears repeating that the constitutional requirement of a fair warning "turns upon the status of ... [the] law as of a given moment in the past -- or, more exactly, the appearance to the individual of the status of ... [that] law as of that moment" just prior to embarking on the conduct in issue. Bowie v. City of Columbia, 378 U.S. 347, 354 (1964)

Organized Crime Control Act may soon inundate the courts with endless prosecutions of those whose actions may fall within the vague contours of the "indictable" and "pattern of racketeering activity" concepts.

II.

The panel decision has escalated the constitutional due process problems arising out of the Government's total failure of proof.

Ordinarily, of course, complaints about the appellate assessment of the Government's proof at a criminal trial do not qualify as grounds for rehearing or for suggesting in banc reconsideration. But this case is an exception.

The panel decision concedes (p. 4436) that the Government utterly failed to prove the very essence of the § 1962(b) allegation -- i.e., "the Government did not trace the proceeds of particular marker collections from specific gambler - debtors through Parness and Olympic to Goberman in the form of a loan ." But the Government's failure of proof went far beyond that. Not even the panel's opinion makes any claim that the Government proved:

a) that any marker collections were missing, withheld or unreported;

b) that any marker collections were stolen or converted; or

c) that either of the appellants stole or converted or withheld any marker collections. Yet proof of such a stealing or conversion was essential to sustain the § 2314 convictions, and tracing the proceeds of such a stealing or conversion to the making of the loan to Goberman was critical to the § 1962(b) charge.

Such a total failure of essential proof makes these convictions invalid under the Fifth Amendment's due process clause. Thompson v. City of Louisville, 362 U.S. 199, 206 (1960). And the panel's effort to substitute circumstantial evidence for the missing direct proof only exascerbates this constitutional due process issue.

It is true, of course, that guilt can be established by circumsstantial evidence. Holland v. United States, 348 U.S. 121, 139-140 (1954). And the fact of theft, just as any other fact, may be proved circumstantially. Anderson v. United States, 406 F.2d 529,532 (8th Cir. 1969). But what the panel has here done -- as set forth more specifically in the appendix hereto -- is to seize upon certain circumstances that were either not proved or were totally unrelated to the critical elements to be proved. For the panel to say that the jury "reasonably could find the requisite theft or conversion" (p. 4437) from such inadequate or non-existent circumstances, or that "we fail to see how the jury could have reached any [other] conclusion" (p. 4439), is to add a new dimension to the due process issue. Is not the Fifth Amendment violated as much by resting a conviction on totally inadequate or unproved circumstances as by resting it on a total lack of direct proof?

The panel decision (p.4440) has added still another element to that constitutional question by repeating the recent statement in United States v. Frank, (2nd Cir. 1974, slip op. 1883, 1896-97), that when a defendant fails to take the stand and thus "has offered no [credible explanation], it may be reasonable for a jury to draw inferences from the prosecution's evidence which would be impermissible if

the defendant had supplied a credible exculpatory version."[7] Effectively, this notion shifts the critical burden of proof to the defendant and constitutes an improper inference from the failure to take the stand.

Does not that statement reflect an acquiescence in the jury's drawing of adverse inferences from the defendant's failure to take the stand? See Griffin v. California, 380 U.S. 609 (1965). If the inferences from the circumstantial evidence might become "impermissible" if the defendant took the stand and offered a "credible exculpatory version,"[8] how do such impermissible inferences become permissible if the defendant does not offer a credible version? And if his failure to offer such a version is explainable as an exercise of his Fifth Amendment privilege, does not the drawing of otherwise impermissible inferences from the circumstantial evidence invade his right to remain silent while being accorded due process of law? See Chapman v. California, 386 U.S.18, 19, n.2 (1967)[9]

Finally, additional constitutional problems are created by the panel's holding (pp. 44414442) that, even if there was a material

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7. That statement from the Frank opinion is the subject of four petitions for certiorari filed in the Supreme Court by the four defendants in that case. Frank v. United States, No. 73-1674; Borgman v. United States, No. 73-1603; Hemlock v. United States, 73-1849; Hoffer v. United States, No. 73-1850.

8. Query whether the jury would be forced to accept a defendant's "credible exculpatory version" and to reject the Government's circumstantial proof. Could not the jury simply disbelieve the defendant or his version? See Anderson v. United States, 406 F.2d 529, 532-33 (8th Cir. 1969); United States v. Sheiner, 410 F.2d 337, 340 (2nd Cir.1969).

9. The failure of a defendant to testify cannot serve to give "added weight" to the Government's proof. Langford v. United States, 178 F.2d 48, 55-56 (9th Cir. 1950).

variance between the Count One charge and that charge as submitted to the jury, the error "was harmless beyond a reasonable doubt." That variance, of course, reflected the Government's total inability to prove the Count One charge that Parness had stolen or converted or withheld marker monies. The Government was thus forced to argue to the jury that Parness' offense was not in converting or withholding funds, but in subsequently denying Goberman access to other funds that Parness had remitted. Such denial of access had not been charged in any portion of the indictment.

The panel's solution to this variance problem was to assert that since there was proof that Parness had withheld marker collections and caused the proceeds to be transported in commerce in violation of § 2314,[10] such violations were sufficient to warrant the conviction under § 1962(b). And that conviction could not, said the panel (p.4442), be affected by the evidence, charge and argument that "Goberman at some later date may ... have been denied access to remitted funds."

But since both the "marker-conversion" and the "remittal-deprivation" theories were submitted to the jury on Count One, the § 1962(b) count, the panel's solution runs directly counter to the established doctrine that if one of two theories of a crime submitted to the jury is constitutionally or otherwise invalid, and it cannot be determined from the jury's general verdict which theory was used

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10. The § 2314 counts specifically alleged interstate transportation of checks or persons involving funds that had been "stolen, converted and taken by fraud from Hotel Corp." If the jury rested its convictions under those counts on the Government's purported evidence concerning a denial of access to other funds, the convictions obviously cannot stand.

in arriving at a conviction, the conviction cannot be upheld. Stromberg v. California, 283 U.S. 359, 368 (1931); Bachellar v. Maryland, 379 U.S. 564, 570-571 (1970). In this case, the verdict under Count One was a general one, and hence must be considered invalid.

These evidentiary matters, to repeat, have been so judicially mishandled as to create constitutional problems of the first magnitude. A rehearing is obviously appropriate in these circumstances.

CONCLUSION

For these various reasons, this petition for rehearing should be granted, and/or the suggestion for a rehearing in banc should be accepted.

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CERTIFICATE OF COUNSEL

I hereby certify that this petition for rehearing and suggestion for a rehearing in banc is presented in good faith and not for purposes of delay, and is filed in accordance with the applicable provisions of the Federal Rules of Appellate Procedure.

ROY M. COHN
Counsel for Appellants

A P P E N D I X

While appellants recognize that this petition is not the proper vehicle to reargue the facts, in light of the panel's holdings that (1) the Government did not trace the proceeds of particular marker collections from specific gambler-debtors, through Parness and Olympic to Goberman, in the form of the Loan (p. 4436); and (2) "in view of the complete absence of any credible explanation as to the source of funds used in connection with the Goberman loan, we fail to see how the jury could have reached any conclusion except that Parness had withheld market collections ... " (p. 4439), the following factual presentation is offered:

Panel Opinion	Facts of Record
1. "There was evidence that Parness was in a position to have collected and to have withheld substantial amounts of marker receipts." (See p.4437.	1. There can be no dispute as to Parness being "in a position" to have collected or withheld marker receipts. But "position" alone cannot qualify as a relevant circumstance where there is no proof that (a) some receipts are missing, and (b) their absence is the result of a theft. Here, there is no such proof.
2. "The record establishes that Hotel Corp. failed to receive approximately $400,000 in overdue marker accounts payable during a period when Parness was solely responsible for and had exclusive control over marker collections. Parness thus had access to vast sums of money due Hotel Corp. and a clear opportunity to have concealed collections and to have withheld the proceeds." See p. 4437; emphasis added.	2. The record simply does not establish that Hotel Corp. failed to receive about $400,000, or any other amount; and the Government's argument before this Court (Brief p.21) was that this $400,000, according to Goberman's testimony, "was owed to Hotel Corp. from gamblers' debts which were either uncollected or collected and not remitted." Obviously, if these debts were "uncollected", Parness would have had no collections to withhold or convert. Goberman's testimony (116a, 495a-5;2-a) alone touched on this matter. His story was that he recollected an "accounts receivable" item approximating $350,000 or $400,000. But Goberman was unable to specify how much of that amount was not collected, was not transmitted, or was not received by Hotel Corp. Such testimony affords no basis for this Court's statement that the Hotel Corp. "failed to receive" the $400,000. Parness' access to these "accounts receivable", of course, does not permit an inference that any accounts were collected and withheld or converted by Parness.
3. "The record further shows that Olympic derived its income almost exclusively from junket front money and marker collections. From this,	3. Govt. Exh. 155, the financial books of Olympic, shows substantial income or gross receipts

Panel Opinion	Facts of Record
the jury was entitled to infer that the two Olympic checks totalling $61,000 ... represented the proceeds of unremitted marker collections." See p. 4437.	from women's air fares and men's air fares and commissions earned by Olympic for sending people to the Hotel. None of that money belonged to Hotel Corp. These records also show disbursements by Olympic from marker collections for air fares and earnings of the junketeers. Payments of Olympic's own operations expenses are also reflected therein. There is nothing in the record, or in Exhibit 155, that establishes that almost all of Olympic's income was from gamblers, or that its funds belonged, actually or beneficially, to Hotel Corp. or Goberman.
4. "The efforts of Parness and Barbara to conceal the use of Olympic funds in connection with the Goberman loan tend to buttress this inference." See p.4437.	4. The record establishes that Barbara openly went to Olympic's own bank and used Olympic's checks, which were freely traceable. Tr. 704-705. How is this concealing the source of the funds?
5. "Barbara testified falsely before the Grand Jury investigating the takeover, that it was Levrey who had provided $150,000 in cash to be used for the Goberman loan." See p.4438.	5. Barbara's Grand Jury testimony shows that Parness handed Barbara the money and told her it was for Levrey - not from Levrey. Levrey, who was Parness' cousin, Tr. 870, had agreed to pay Parness $100,000 out of independent future earnings for a partnership in Hotel Corp. See Govt. Brief, p.23, fn.
6. "[T]here was evidence that Parness resorted to similar schemes to disguise his own personal involvement in the Goberman loan and the subsequent clandestine corporate transactions." See pp. 4438-4439.	6. At no time did the Government prove, or attempt to prove, that Parness disguised his participation in the transaction as respects Goberman. Parness was on the scene at all times. His future wife (who was like a daughter to Goberman) and his cousin Amsterdam were the nominees, a fact known to

Panel Opinion	Facts of Record
	Goberman. Olympic checks were openly used. Parness secured the lawyer for Goberman to fight the Holzer foreclosure, and he sent Goberman a lawyer to try to obtain the $60,000 seized by I.R.S. agents from Norber. Parness was also present physically in St. Maarten in April 1971, with Mr. and Mrs. Goberman and their attorney when the loan papers were signed.
7. "Shortly before the Goberman loan, as noted above, agents of the Internal Revenue Service seized $60,000 in cash marker collections intended for Parness." See p. 4438.	7. Goberman testified that he -- not Parness -- was to have been the recipient of this $60,000, which was owned by Norber to Hotel Corp. See 476a - 477a, 505a-506a.

The other circumstantial evidence mentioned in the panel opinion, while not directly contradicted by the record, is without probative value in the absence of proof that marker collections were collected, stolen, withheld or converted. A circumstance can have relevance, to aid in finding guilt beyond a reasonable doubt, only if the fact of a crime having been committed -- the corpus delicti, so to speak -- has been proved.